DIVISION III

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
ROBERT J. GLADWIN, Judge

CA05-1360

DECEMBER 20, 2006

APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT
[NO. CV-2003-1090-VI]

HON. JAMES MARCHEWSKI, JUDGE

AFFIRMED

KATHY HAIRGROVE
APPELLANT

V.

HUSSIAN R. ODEN
APPELLEE

This is an appeal from a jury verdict in favor of appellee Hussain B. Oden in a lawsuit brought by appellant Kathy Hairgrove[1] seeking money damages for injuries sustained as a result of an automobile accident that occurred on March 1, 2002. Appellant attempts to raise four points on appeal: (1) the circuit court erred in denying her motion in limine to exclude an application for long-term disability that she filed on October 14, 2002; (2) the circuit court abused its discretion in admitting photographs of the property damage to her vehicle; (3) the attempt by lay jurors to connect injuries to crash damage without the aid of expert testimony

[1]Appellant's husband, Monty Hairgrove, was also in the vehicle at the time of the accident and was originally a plaintiff in the lawsuit. He was non-suited as a plaintiff to the action shortly before trial.

was no more than baseless speculation; (4) the only admissible evidence on causation was testimony from qualified medical experts. Finding no error, we affirm.

Appellant alleged that on March 1, 2002, appellee, suddenly and without warning, ran into the back of her vehicle at an intersection in Fort Smith, Arkansas. The complaint claimed that appellee was negligent in failing to yield and failing to keep a proper lookout. Appellee denied liability in the case and argued that any injuries appellant suffered were the result of a pre-existing condition. Prior to trial, appellant filed a motion in limine arguing that an application for long-term disability filed after the accident should not be allowed into evidence because it would violate the collateral-source rule. The circuit court ruled that the document could be utilized for impeachment purposes. Additionally, appellant requested that the circuit court redact any reference to long-term insurance that was contained in the application. That motion was also denied. Appellant also filed a motion to exclude from evidence certain photographs of her vehicle, which undisputedly depicted the accurate condition of the vehicle after the accident. After a hearing, that motion was also denied.

The matter was tried before a jury on May 26, 2005, during which the application was admitted as an exhibit. As part of the closing argument, appellee's attorney referred the jury to the application and stated that appellant was clearly "trying to double dip." Appellant objected on the ground that the comment was in violation of the circuit court's previous ruling. The circuit court stated that the use of the term "double dip" was permissible during closing arguments and refused to give any specific admonishing instruction.

Additionally, the circuit court allowed the photographs of appellant's vehicle taken after the accident to be admitted into evidence. Appellant again claimed that the photographs were irrelevant to the issues before the court, or that even if they were deemed to be relevant, they should have been excluded due to their prejudicial nature.

I. Application for long term disability

(A) *Admission of application into evidence*

We review assertions of evidentiary error under an abuse-of-discretion standard. *Sparkman v. Ark. Dep't of Human Servs.*, __ Ark. App. __, __ S.W.3d __ (Nov. 1, 2006). The circuit court has broad discretion in its evidentiary rulings; hence, the circuit court's findings will not be disturbed on appeal unless there has been a manifest abuse of discretion. *See id.*

During the hearing on appellant's motion in limine regarding the application for long-term disability, her attorney argued that the application would "certainly suggest to the jury that she has been receiving a collateral source of income, which again, could prejudice the jury." Appellee's counsel explained that they had no intention of offering the application as a collateral source, but rather, for the purpose of impeaching appellant's testimony. The circuit court instructed appellee's attorney not to go into or make any reference that appellant was awarded, received, or was entitled to benefits, just that she made the application.

The collateral-source rule prohibits the admission of evidence showing that an injured person *received payments* from another source, unless relevant for some other purpose other

than mitigation or reduction of damages. *See Wal-Mart Stores, Inc. v. Kilgore*, 85 Ark. App. 231, 148 S.W.3d 754 (2004). The sole purpose of the rule is to prevent the tortfeasor from benefitting from any recovery the injured party receives from another source, which is not what happened in the instant case. No evidence was presented that appellant received any benefits, merely that she submitted an application for long-term benefits.

The application was allowed by the circuit court for the purpose of impeaching the credibility of appellant. The circuit court stated in its ruling that appellant "made no reference to the accident that occurred [in the application] as an explanation for her pain and suffering, thereby at least implying that all of that was due to whatever accident she suffered on the ice [in 1994]." The application specifically asked "If your condition is the result of an accident, please give date, time, and nature of the accident. Describe Briefly." Appellant wrote, "Fell at work approx. winter of 1994. Fell on ice striking right side of body on curb. Fell at Echols Building at former Westark College, now University of Fort Smith at Ark [sic]." On cross-examination, appellant testified that she did not mention on the application the automobile accident of March 1, 2002, and that she stated that all of her problems were related to her fall in 1994. Because no benefits were paid to appellant, no evidence of such could have been presented to the jury. Because the information was provided to question appellant's credibility, there was no abuse of discretion.

(B) *Redaction of information on application*

Appellant next argues that the circuit court's error in allowing the application to be admitted into evidence could have been cured had the motion been granted to redact any reference to insurance on the application. During the hearing, appellant's counsel pointed out that the information could easily be redacted because all the information that appellee needed was at the bottom of the form. The circuit court denied the motion, stating that "the jury would have a hard time understanding exactly what she was making the representation for, without understanding all the facts consistent with it." Appellant contends that the circuit court's failure to require the information be redacted caused her to be prejudiced by the reference to insurance.

Appellee counters that appellant has failed to show how the references to insurance on the application were objectionable or in any way prejudiced her. She argues that the jury would not have understood the significance of the application and appellant's representation regarding the source of her injuries if the purpose of the application had been kept from them.

Our supreme court has stated, "It is a fundamental principle of appellate procedure which is universally recognized and applied that a party cannot assign as error that which is not prejudicial to him; and harmless error, that is error unaccompanied by prejudice or injury, is not ground for reversal." *Campbell v. Entergy Ark., Inc.*, 363 Ark. 132, __ S.W.3d __ (2005). Thus, because appellant has failed to demonstrate prejudice accompanying any error

that might have been associated with the admission of the application, and more specifically with the reference to insurance contained therein, we will not reverse.

(C) *Refusal to admonish the jury*

Appellant next contends that the circuit court erred in refusing to admonish the jury regarding a particular statement made by appellee's counsel regarding the application during closing arguments, specifically:

> You are the soul [sic] judges of the credibility of the winessess's [sic]. You have someone who has something to gain here? Ms. Hairgrove, the woman who filled out a longterm disability sheet, and didn't mention the automobile accident that supposedly caused all these problems. Now don't you know what she was trying to do there? She wasn't trying to say oh, that's when it all started. She's trying to double dip, with the lawsuit, and filling out an application. That's what she's trying to do.

Appellant's counsel objected, but the circuit court ruled that "trying to double dip" was permissible during closing argument. Appellant now contends that the allowance of the statement was contrary to the circuit court's earlier ruling, as well as the appellee's assurances that the application would not be used for any purpose except impeachment. She asserts that the circuit court should have, at a minimum, made an admonition to the jury in order to help cure the prejudicial statement. *See Swink v. Lasiter Constr., Inc.*, 94 Ark. App. 262, __ S.W.3d __ (2006).

In appellant's counsel's rebuttal argument, he had the opportunity to respond to the comment in question, and argued:

> He mentioned the word double dip. On an application for long-term disability, if we were trying to double dip, we would be asking this jury for lost wages, lost earnings

> going into the future, lost earnings after the accident. Have you heard one word of evidence about that from us? The answer is no, because we're not trying to double dip.

Based upon our review of the transcript, appellant failed to request a special admonition on this particular issue; however, the jury was instructed by the circuit court that "[o]pening statements, remarks during the trial and closing arguments of the attorneys are not evidence, but are made only to help you in understanding the evidence and applicable law. Any arguments, statements, or remarks of an attorney having no basis in the evidence should be disregarded by you." This general instruction was sufficient, absent a request for a special admonition by the appellant, and we find no error with respect to this issue.

II. Admission of photographs of property damage to appellant's vehicle

Questions regarding the admissibility of evidence are matters entirely within the trial court's discretion, and such matters will not be reversed absent an abuse of that discretion. *See J.E. Merit Constructors, Inc. v. Cooper*, 345 Ark. 136, 44 S.W.3d 336 (2001). The first question upon the introduction of photographs, as with all evidence, is whether they are relevant. *Id.*; *see also Ryker v. Fisher*, 291 Ark. 177, 722 S.W.2d 864 (1987) (the test of whether photographs are admissible into evidence depends on the fairness and correctness of the portrayal of the subject and their admissibility addresses itself to the sound discretion of the judge).

Appellant's counsel spends twelve pages on this topic, citing innumerable cases from other jurisdictions, law review articles, treatises, and even a couple of websites. His breadth of research on the topic is vast; however, the vast majority of the information presented to us was argued before the circuit court as part of the pre-trial motion and the resolution of which was within the sole discretion of the circuit court. In brief, appellant argues that: (1) the photographs showing the property damage sustained by appellant's vehicle were irrelevant to the issues in the case; (2) determining the force involved in a vehicle-to-vehicle impact requires expert testimony, which was not presented; (3) even if the force involved in the impact could be determined, it does not allow for the determination of the force transferred to the impacted vehicle; (4) even if both those things could be proven, it would not allow for a determination of the force transferred to appellant as a vehicle occupant; (5) even if all three of those things could be proven, it would not allow for a juror to determine on his or her own whether the vehicle occupant would be injured in such an impact.

As appellee points out, the photographs were relevant to the case because the damage to appellant's truck was important to develop an understanding of the facts surrounding the accident, which was the subject of the case before the jury. Furthermore, appellant's counsel opened the door to this issue when, on direct examination, he asked appellant to describe the bumper of her truck. She explained that the bumper was curled under the truck, the top site was pulled out, and the bottom part was pushed under. She further stated that it looked like somebody had "just jacked up" the rear-end of the truck, and that if you looked at it from the

back end, the bumper was not in a normal position at all. Appellee asserts that the photographs, which were undisputedly correct representations of the vehicle in which appellant was riding when she supposedly sustained her physical injuries, would assist the jury in understanding the details of the accident.

Beyond the lengthy dissertation presented by appellant's counsel, no well-reasoned argument supported by Arkansas case law, rules, or statutes is before us on this issue. The Arkansas Supreme Court stated in *Hodges v. Lamora*, 337 Ark. 470, 989 S.W.2d 530 (1999), that assignments of error unsupported by convincing argument or authority will not be considered on appeal, unless it is apparent without further research that the point is well taken. The circuit court did not abuse its discretion in allowing the photographs to be admitted, and the issue was thoroughly addressed in the court's ruling during the pre-trial hearing on appellant's motion. We affirm on this point as well.

III. Absence of expert testimony

Appellant's next point on appeal appears to be an argument that the jurors were wrongfully asked to use their common sense to make inferences regarding a connection between the crash damage, impact speed, and injuries sustained without the benefit of expert testimony. Appellant's counsel presents this court with approximately four pages on this issue, again citing cases from other jurisdictions discussing vehicle impact and force and inferences of injuries, basically arguing that evidence related to the speed of the vehicles at the time of the accident should have been disallowed because their prejudicial impact

outweighed any probative value. The bottom line is that even the cases cited by appellant basically leave the decision as to the admissibility of such evidence to the discretion of the trial judge.

The parties testified as to their individual impressions of the impact of appellee's vehicle, a 1997 Ford Probe, hitting appellant's vehicle, a 2002 Chevy Silverado. While appellee testified that she believed she was going no more than two to three miles per hour at the time of the accident, appellant described the impact as hearing "something like an explosion and the next thing I know, my head is snapping back."

The circuit court specifically addressed the issue of testimony regarding the speed of vehicles in the pre-trial hearing and reiterated that no one would be allowed to testify regarding the speed unless that person was a properly qualified expert or an appropriate witness who saw the speedometer on the vehicle at the time of the accident; however, lay witnesses could give their opinions if proper foundation was laid. The parties to the accident appear to have presented their respective opinions about the circumstances surrounding the collision, and the circuit court was within its discretion to admit the testimony into evidence.

It is the jury's exclusive province to weigh the evidence and draw inferences of fact not established by direct proof. *See Cinnamon Valley Resort v. EMAC Enters., Inc.*, 89 Ark. App. 236, 202 S.W.3d 1 (2005). Jurors are entitled to take into the jury box their common sense and experience in the ordinary affairs of life. *Fayetteville Diagnostic Clinic, Ltd. v. Turner*, 344 Ark. 490, 42 S.W.3d 420 (2001). We find no error and affirm on this point.

IV. Qualified medical expert testimony as evidence on causation

Appellant' s counsel submitted to the court a two-and-a-half page explanation that the expert testimony of health care providers is the one form of evidence universally admissible on the issue of injury causation. However, he in no way relates this explanation to the facts of the instant case and presents no valid argument supported by Arkansas case law, rules, or statutes for this court to review. We reiterate that assignments of error unsupported by convincing argument or authority will not be considered on appeal, unless it is apparent without further research that the point is well taken. *Hodges v. Lamora*, *supra*.

Affirmed.

PITTMAN, C.J., and ROBBINS, J., agree.